No. 94- _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

James Purkett, Superintendent
Farmington Correctional Center ..... *Petitioner*
vs.
Jimmy Elem ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A VENIREPERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER *HERNANDEZ V. NEW YORK*, 111 S.CT. 1859 (1991).

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OPINIONS BELOW

The June 1, 1994 panel opinion of the United

States Court of Appeals remanding the cause to the district court with instructions to grant the writ of habeas corpus is reported at 25 F.3d 679 (8th Cir. 1994), and is included in the Appendix at A-1.

The order denying the petition for rehearing or rehearing en banc is unreported but is included in the Appendix at A-45.

The orders of the United States Court of Appeals for the Eastern District of Missouri denying the petition for writ of habeas corpus are not reported but is included in the Appendix at A-14 and A-15.

The Magistrate's Report and Recommendation is not published, but is also included in the Appendix at A-17.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on June 1, 1994. The petition for rehearing or rehearing en banc was denied on July 28, 1994. Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the Circuit Court of the City of St. Louis, respondent was convicted by a jury of second degree robbery, § 569.030.1, RSMo 1986, and was sentenced by the court as a persistent offender, § 558.016.3, RSMo 1986, to twenty-five years in prison. The facts surrounding the circumstances of the offense are as follows: The victim, a black woman, was walking home from work on October 5, 1985, at about 11:00 p.m. A black man, wearing grey sweatpants, a grey hooded sweatshirt and white high-topped tennis shoes, jogged past her, ran ahead, and then turned and jogged toward her. She saw his face as he approached because the area was well lighted. As he passed, he grabbed her, pulled her into an adjacent building, and hit her. He demanded money and threatened her with a bottle he broke against a wall. She pulled away from him and ran back to the street, where he caught her purse, breaking its handle and snatching it from her. She again saw his face. He fled into a dead-end street and then south across a small park. The victim, along with two black women in a car who had seen the man steal the purse, followed him as far as the dead-end. The victim noted that the man had "French braided" hair.

Officer John Bridges of the Wellston Police Department spoke to two black women in a car at the police station and again near a liquor store, which was a few blocks south of the scene of the incident. At the liquor store, Bridges detained respondent, who was at the liquor store, asking for a clothes hanger to open his car; he said he had locked his keys in his car. Respondent was wearing cut-off blue jeans, a tee-shirt and white high-topped tennis shoes despite the fact that the weather was "chilly," and he was the only person at the liquor store in shorts. Bridges noticed that respondent was perspiring and his hair had French braids. He took respondent to the vacant building, the scene of the assault, where the victim, sitting in another officer's car, identified him as her assailant. Another officer found grey sweatpants, inside out and with burrs stuck to them, a grey hooded sweatshirt and the victim's purse under a car parked near the liquor store. The victim identified the sweatpants and sweatshirt as those worn by the robber. The Missouri Court of Appeals affirmed respondent's conviction and sentence. *State v. Elem*, 747 S.W.2d 772, 773 (Mo.App., E.D. 1988) (App. A-29). After his direct appeal was affirmed, respondent pursued relief in the federal courts.

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 23, 1992, in the United States District Court for the Eastern District of Missouri (App. A-46). After respondent filed his responsive pleading to the District Court's show cause order, the District Court referred the matter to a United States Magistrate for a Report and Recommendation. The Magistrate, Terry I. Adelman, recommended on January 19, 1993, that the petition be denied (App. A-17). After objections by respondent, on February 18, 1993, the District Court, the Honorable Jean C. Hamilton, entered an order sustaining and adopting the Magistrate's Report and Recommendation (App. A-15). At that time, the District Court also denied the petition for writ of habeas corpus (App. A-14).

Respondent appealed the denial of relief to the United States Court of Appeals for the Eighth Circuit. After briefing and an oral argument, the Court entered an order remanding the cause to the District Court with directions that the writ of habeas corpus issue. Petitioner filed a petition for rehearing and rehearing en banc. On July 28, 1994, the panel denied the petition for rehearing (App. A-45). The suggestions for rehearing en banc were also denied; however, three judges of the appellate

court, the Honorable Pasco M. Bowman, II, the Honorable C. Arlen Beam and the Honorable Morris S. Arnold, voted to grant the petition for rehearing en banc (App. A-45). The present petition for writ of certiorari ensues.

ARGUMENT

WHETHER A PERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER *HERNANDEZ V. NEW YORK*, 111 S.CT. 1859 (1991).

The Court is aware of the importance of peremptory challenges to the litigants in criminal and civil litigation. Beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court initiated closer regulation of the peremptory challenge process. While the *Batson* decision created a framework for examining a prosecutor's use of peremptory challenges, this Court has extended this review to the examination of peremptory challenges by a criminal defendant, *Georgia v. McCollom*, 112 S.Ct. 2348 (1992) and to the entire civil bar, *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991). The importance of proper review by trial courts and appellate courts of the *Batson* framework is apparent. The Court of Appeals method of review conflicts with courts from other circuits and creates a

significant question for review by this Court. Supreme Court Rule 10.1.

Batson v. Kentucky sets forth a three step test for trial courts in evaluating claims that a litigant has used a peremptory challenge in a manner violating the equal protection clause. 476 U.S. at 96-98.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. at 1722-1723. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. *Id.* at 97-98, 106 S.Ct. at 1723-24. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. at 1723.

Hernandez v. New York, 111 S.Ct. 1859, 1866 (1991) *citing Batson v. Kentucky*, 476 U.S. at 96-98. Once these

matters are resolved by the trial court, the appellate court then has the power to review for clear error. In the context of federal habeas corpus litigation, this review requires the application of a statute. 28 U.S.C. § 2254(d). The reviewing federal courts, be they district courts, courts of appeals, or this Court, are required by this statute to accord state court factual findings a presumption of correctness. *Hernandez v. New York*, 111 S.Ct. at 1869. The Court of Appeals blurs the second and third steps of a *Batson* challenge. This petition will separate steps two and three and will discuss why the state courts' and the magistrate's and the district court's findings of no racial discrimination should be affirmed.

Step One

The panel applied *Hernandez v. New York* concerning the issue of whether petitioner made a prima facie case (App. A-7 to A-8 *citing Hernandez v. New York*, 111 S.Ct. at 1866).

Step Two

Once a prima facie case is made, the striking

litigant must articulate a race-neutral explanation for striking the juror. *Hernandez v. New York*, 111 S.Ct. at 1866 *citing Batson v. Kentucky*, 476 U.S. at 97-98. This is called a burden of production. The *Hernandez* court defined this element:

> In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.

Id. at 1866. The *Hernandez* court continued:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.

Id. at 1866. In discussing *Batson's* second step, the court of appeals fails to rely on the controlling precedent of *Hernandez*[1]. (App. A-8 to A-11).

The reasons articulated by the prosecutor for his strike of Juror 22 concerned that juror's appearance.

> I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder-length, curly, unkept hair. Also, he had a

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[1]As *Hernandez* makes clear, the question of whether the attorney's explanation was race-neutral is a legal issue. Of course, currently, issues of federal constitutional law are subject to *de novo* review by the federal court, not the clearly erroneous standard applied by the Court of Appeals (App. A-12). *United States v. Wilson*, 884 F.2d 1121, 1124 (8th Cir. 1989) (en banc). This error by the Court of Appeals is to the detriment of a challenging party in its attempt to obtain appellate review.

> length, curly, unkept hair. Also, he had a mustache and a goatee-type beard. And Juror number twenty-four also has a mustache and a goatee-type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four[,] with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they look, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.

(App. A-41).

Applying the *Hernandez* standard to the reason stated by the prosecutor, the issue becomes whether, "assuming the proffered reasons for the peremptory challenges are true, the challenges violate the equal protection clause as a matter of law." *Hernandez v. New York*, 111 S.Ct. at 1866. Using a peremptory challenge on an individual on the basis of his shoulder length, curly, unkempt hair and his facial hair does not violate the Equal Protection Clause as a matter of law. This

than the race of the juror." *Id.* Since no discriminatory intent is inherent in the prosecutor's explanation. The proffered reason should be deemed race-neutral. *Id.* Further applying the *Hernandez* analysis, "the prosecutor's articulated basis for these challenges divide potential jurors into two classes": those with unkempt hair and facial hair and those without. Each category would include both African-Americans and non-African-Americans. "The wearing of beards is not a characteristic that is peculiar to any race." *E.E.O.C. v. Greyhound Lines*, 635 F.2d 188, 190 n. 3 (3d Cir. 1980). The prosecutor's explanation does not lead to the conclusion that the challenge violates the Equal Protection Clause as a matter of law. *See id.* at 1867.

The Court of Appeals failed to perform *Hernandez* analysis as to the second step of the Batson test (App. A-8 to A-11). Instead of applying the specific and clear language of *Hernandez*, the panel stated:

> In a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial

> group, [2] solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in a particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror.

(App. A-11) (footnote added). The Court should notice that this is not a quote from an opinion from the United States Supreme Court. This Court should notice that the Court of Appeals offers no citation to support this legal principle. Finally, this Court should notice that this language is inconsistent with the standard in *Hernandez*. Again, the *Hernandez* court stated:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.

Hernandez v. New York, 111 S.Ct. at 1866. This Court does not require a striking litigant to "articulate some plausible race-neutral reason for believing those factors will somehow affect the person's abilities to perform his or her duties as a juror," as required by the opinion below. (App. A-11).

Since a striking litigant is using "intuition" or "hunch" as the basis for the strike, it will be virtually impossible for that litigant to say why he or she wants to remove that venireperson[3]. This new legal requirement

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[2] This Court says that the litigant challenging a party's peremptory challenge need not be a member of the same group as the venireperson. *Powers v. Ohio*, 111 S.Ct. 1364 (1991). Petitioner has no explanation for the Court of Appeals' addition of this element.

[3] In *State v. Aubrey*, 609 So. 2d 1183 (La.Ct.App., 3d Cir. 1992), venireperson Janice Morris came to court with her hair in curlers. The curlers would not affect her performance as a juror, but the Court can see

violates the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989). This new legal requirement is contrary to the express language from this Court. Given the conflict between the opinion of the lower court and this Court, certiorari review is necessary. Supreme Court Rule 10.1.

A case from the Fifth Circuit also illustrates that a litigant's "intuition" should be a sufficient race-neutral reason under the second step of *Batson*. Whether it will be believed by the trial judge (Step Three) is a separate issue of course.

> An attorney who claims that he or she struck a potential juror because of intuition alone, without articulating a specific factual basis such as occupation, family background or even eye contact or inattentiveness, is more vulnerable to the inference that the reason proffered is a proxy for race. That is not to say, however, that the reason should be rejected out of hand; that is a call for the judge to make . . . .

United States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993). A litigant's reason need not be like a challenge for cause, *Batson v. Kentucky*, 476 U.S. at 97; thus, a litigant's use of intuition is proper. *United States v. Munoz*, 15 F.3d 395, 399 (5th Cir. 1994) (strike because juror was unemployed and had children on welfare); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (juror sat with arms crossed and appeared hostile); *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir.) (juror "slovenly" attired), *cert. denied*, 490 U.S. 1028 (1989); *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991) (hairstyle and dress); *United States v. Hughes*, 911 F.2d 113 (8th Cir. 1990) (shabby dress); *United States v. Hendrieth*, 922 F.2d 748 (11th Cir. 1991) (juror rubbing and rolling eyes).

In the paragraph following the Court of Appeals announcement of the new legal standard (App. A-11 to A-12), the Court of Appeals quotes *Hernandez* to support its standard. The *Hernandez* language is out of context. Significantly, the court does not quote language from

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how one of the litigants, be it the defendant, the State or a civil litigant, would want to use a peremptory challenge on this individual.

Section IIB of the *Hernandez* opinion, the section of that opinion concerning *Batson's* second step. *Hernandez v. New York*, 111 S.Ct. at 1866-68. Rather, the Court of Appeals quotes language from page 1873 of the *Hernandez* opinion, where this Court warned that a trial judge may not believe a prosecutor's reason for a strike if it does not relate to the particular circumstances of the trial or the individual responses of the jurors (App. A-12, *quoting Hernandez v. New York.*, 111 S.Ct. at 1873). First, this quoted language concerns *Batson's* third step, whether the prosecutor's stated reason is a "pretext for racial discrimination" (App.A-12). This quoted language does not support the proposition that, as a matter of law, the prosecutor must explain how his racially neutral reason for striking a venireperson might somehow affect the ability of that venireperson to perform his or her duties.

To the contrary, the quoted language from *Hernandez* fatally undercuts the new legal standard from the Court of Appeals. Before the third *Batson* issue (pretext) can be reached, the striking litigant must fulfill his burden of production, articulating a race-neutral explanation for the strike. *Batson v. Kentucky*, 476 U.S. at 97-98. If the striking litigant does not fulfill this

burden, the *Batson* inquiry is complete and resolved against the striking litigant. *See United States v. Wilson*, 884 F.2d at 1124. According to *Hernandez*, since the *Batson's* third step can be reached in a situation where a striking litigant gives a race-neutral reason for the strike "without regard to the particular circumstances of the trial or the individual response of the jurors," the race-neutral explanation is sufficient as a matter of law without further explanation. Put another way, the quoted language notes that the trial judge may accept a race-neutral explanation even if it does not relate to the case or to the jurors. For the trial judge to have that discretion, a race-neutral reason for the strike must be sufficient as a matter of law under step two of *Batson* and *Hernandez*. Not only does *Hernandez* lend no support to the Court of Appeals novel proposition, indeed, the Court of Appeals' legal conclusion is contradicted by *Hernandez's* legal analysis.

The Court of Appeals also purports to rely upon language from the Supreme Court of Missouri's decision in *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (App. A-9 to A-11). First, *Antwine* was decided by the Supreme Court of Missouri four years before this Court's decision in

Hernandez. Between the two, *Hernandez* should control. Second, the Supreme Court of Missouri has candidly stated that *Antwine* does not follow the procedures set forth in *Batson*; rather, the *Antwine* procedure is more solicitous of equal protection rights than required by this Court. *See State v. Parker,* 836 S.W.2d 930, 938 (Mo. banc), *cert. denied*, 113 S.Ct. 636 (1992). Third, since *Antwine*, the Supreme Court of Missouri has stated that "the degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment if the defendant is convicted is likewise important" in determining whether the explanation is pretextual. *Id*. at 940. The Supreme Court of Missouri has made clear that the factor the Court of Appeals found determinative of the *Batson* second step is, in reality, merely one of several factors to be considered in resolving the *Batson* third step.

Finally, the Court of Appeals relies on language in *Batson* to support its new standard. The language in *Batson*, however, should be contrasted with that in *Hernandez*. While *Batson* was a very general case, the *Hernandez* decision went to great lengths to describe the parameters of a litigant's race-neutral explanation for a

strike. *Hernandez v. New York*, 111 S.Ct. at 1866-68. The *Hernandez* decision is also more recent than *Batson*. The purpose of the "clear and reasonably specific" language in *Batson* was to emphasize the requirement that a litigant's statement of good faith or disclaimer of discriminating intent was insufficient. *Batson v. Kentucky*, 476 U.S. at 97-98; *United States v. Wilson,* 867 F.2d 486, 488 (8th Cir. 1989); *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992). This purpose is now fulfilled by the *Hernandez* test. Petitioner submits that *Hernandez* properly describes *Batson's* second step. See *United States v. Bentley-Smith*, 2 F.3d at 1375 (upholding intuitive reasons for strike as "clear and reasonably specific").

Step Three

Once the striking litigant states a race-neutral reason for the peremptory strike, the trial court then has the duty to determine if the objecting litigant has established purposeful discrimination. *See Hernandez v. New York*, 111 S.Ct. at 1868. This is an issue for the trial court to decide. The Court of Appeals' standard of review of federal district court decisions on this issue is one for "clear error." "On federal habeas review of a state conviction, 28 U.S.C. § 2254(d) requires the federal

courts to afford state court factual findings a presumption of correctness." *Hernandez v. New York*, 111 S.Ct. at 1869. The issue before the federal habeas corpus appellate court is not whether there is "clear error" since that is not one of the statutorily enumerated exceptions to the presumption of correctness. 28 U.S.C. § 2254(d) (1) - (8). Rather, as the Supreme Court and Congress require, the issue is whether the state court's factual determination is "fairly supported by the record." 28 U.S.C. § 2254(d) (8). *See Marshall v. Lonberger*, 489 U.S. 422, 434-35 (1983) (distinguishing state and federal appellate court review of fact finding). Is there fair support in the record for the state court's finding that there was no intentional discrimination? Yes. The fair support takes several forms.

First, perhaps most obviously, is the prosecutor's stated reason for his peremptory strike (shoulder length, curly, unkempt hair with mustache and beard) -- a reason the trial court found credible (App. A-42 to A-43). If the trial court found this race-neutral reason credible, such a determination is a finding of fact to which the federal courts owe deference. "Title 28 U.S.C. § 2254(d) gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by the

federal trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. at 434. The Court of Appeals, however, protests that there was insufficient detail in the prosecutor's reason (App. A-11). Congress, however, gives no license to redetermine the credibility of the litigant's attorney. *See United States v. Lorenzo*, 995 F.2d 1448, 1454 (9th Cir. 1993) (upholding litigant's strike of juror due to long hair and beard).

Second, after the prosecutor gave his race-neutral explanation for his peremptory challenge, petitioner did not suggest to the trial court that the reason was a pretext. Petitioner's attorney stated:

> Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record[,] if the court would like to call up these two individuals to ask them if they are black or will the court take judicial notice that they are black individuals?

THE COURT: I am not going to do that, no, sir.

MR. GOULET: Okay. Nothing further.

(App. A-42). As the record demonstrates, after the prosecutor gave his race neutral reasons for striking venireperson number twenty-two, petitioner offered no reason to the trial court to believe that it was pretextual. "Once the State came forward with neutral explanations, defendant had the obligation to demonstrate that the State's explanations were pretextual." *State v. Hudson,* 822 S.W.2d 447, 481 (Mo.App., E.D. 1991). While petitioner was before the trial court, however, he did not even allege that the prosecutor's explanations were pretextual. Under these circumstances, "we must assume that no challenge was made to the State's reasons because trial counsel was satisfied that the strike had not been made with the intent to discriminate." *State v. Davis*, 835 S.W.2d 515, 527 (Mo.App., E.D. 1992). "Where counsel for appellant is satisfied with the reasons given, this [appellate] court is hardly in a position to find that the trial court erred." *Id.; State v. Jackson*, 809 S.W.2d 77, 81 (Mo.App., E.D. 1991); *United States v.*

Brooks, 2 F.3d 838, 841 (8th Cir. 1993). Respondent's failure to suggest that the prosecutor's explanation was pretextual is also fair support for the state court's factual finding.

Third, the prosecutor used less than all his peremptory strikes to remove only two of the three African-American venirepersons (App. A-39). The Court of Appeals analysis of this factor is inapplicable. The reference to *Randolph v. Delo*, 952 F.2d 243, 245 & 3 (8th Cir. 1991) (per curiam) *citing United States v. Johnson*, 873 F.2d 1137, 1139 n. 1 (8th Cir. 1989), refers only to the issue of whether a prima facie case has or has not been established through statistics (*Batson* step one). Of course, if a litigant has the opportunity to strike African-Americans but does not, this fact creates a permissive inference that the litigant's strikes were made lawfully. *See United States v. Jiminez*, 983 F.2d 1020, 1023 (11th Cir. 1993); *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir.), *cert. denied*, 111 S.Ct. 1681 (1991) (unchallenged African-American on jury undercuts inference of discrimination); *United States v. Nichols*, 937 F.2d 1257, 1264 (7th Cir.), *cert. denied*, 112 S.Ct. 989 (1991).

Fourth, the prosecutor voluntarily defended his use of peremptory challenges without a request by the trial judge (App. A-39). This is an independent factor this Court found as support for the findings in *Hernandez v. New York*, 111 S.Ct. at 1872.

Fifth, the prosecutor was unaware of which venirepersons were African-Americans. "I don't know if all three of those people are, in fact, black. There has been no testimony to that . . ." (App. A-40). Again, this is an independent factor that this Court found to support the trial court's factual finding that there was no intentional discrimination. *Hernandez v. New York*, 111 S.Ct. at 1872.

Sixth, the Missouri Court of Appeals found the fact that the crime victim was an African-American supported the trial court's finding that there was no intentional discrimination. *State v. Elem*, 747 S.W.2d at 775. This Court also found that the ethnicity of the victim and the prosecution witnesses tended to undercut the motive to exclude Latinos from the jury. *Hernandez v. New York*, 111 S.Ct. at 1872. Likewise, the race of the victim and the prosecution's chief witness in the present case also supports the trial court's finding. The

Court of Appeals failed to discuss the factors that this Court felt were significant in *Hernandez*. "Any of these factors could be taken as evidence of the prosecutor's sincerity." *Hernandez v. New York*, 111 S.Ct. at 1872.

The state court's fact finding has fair support in the record. 28 U.S.C. § 2254(d).

The significance of this issue to the trial practitioners is apparent. As this Court has made clear, racial, ethnic and gender discrimination by prosecutors, by defense counsel, and by civil practitioners is unlawful. That is as it should be. When a practitioner, however, offers a race-neutral explanation for the peremptory strike, that fulfills the *Batson* burden of production. There should be no requirement upon the civil and criminal Bars to explain their trial strategy -- intuition, hunches and the like -- beyond the basic requirement of *Hernandez*. Any decision by the litigant to do so should be made only out of a desire to make the race-neutral explanation more credible to the trial judge. *Hernandez v. New York*, 111 S.Ct. at 1873. Once a race-neutral explanation is made, then the trial courts are obligated to determine whether the explanation is pretextual. As *Hernandez v. New York* attempted to make clear, the trial court's determination of pretext, whichever way it is

trial court's determination of pretext, whichever way it is decided, is subject to deference by an appellate court reviewing a cold record years after trial. *Id.* at 1868-72. There should be an additional degree of deference when a federal appellate court is reviewing the fact-finding of a state trial court. 28 U.S.C. § 2254(d). The issue presented in the present litigation is of interest to all practitioners, practitioners in state and federal court as well as practitioners in civil and criminal litigation.

Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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